

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
March 18, 2008 Session

**STATE OF TENNESSEE v. DAVID LEE HINTON**

**Appeal from the Criminal Court for Davidson County  
No. 2005-A-14     Monte Watkins, Judge**

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**No. M2007-00677-CCA-R3-CD - Filed November 4, 2008**

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The defendant, David Lee Hinton, appeals from his convictions for attempted first degree murder, a Class A felony, and attempted especially aggravated robbery, a Class B felony. He received consecutive sentences of twenty years as a Range I offender for the attempted first degree murder conviction and ten years as a Range I offender for the attempted especially aggravated robbery conviction, for an effective sentence of thirty years. On appeal, he claims (1) that the trial court should have allowed him to withdraw his guilty pleas, (2) that he was entitled to an additional mental evaluation, and (3) that the sentences are erroneous because they were imposed in violation of his Sixth Amendment right to a jury trial and the court did not make the proper findings for consecutive sentencing. We reverse the trial court's denial of the defendant's motion to withdraw his guilty pleas and remand the case for a hearing on the motion. We also hold that the trial court applied the wrong law in sentencing the defendant and remand for a new sentencing hearing in the event the trial court denies the motion to withdraw the guilty pleas.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed, Case Remanded**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Jonathan E. Richardson, Nashville, Tennessee, for the appellant, David Lee Hinton.

Robert E. Cooper, Jr., Attorney General and Reporter; James E. Gaylord, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Deborah M. Housel, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The defendant's convictions result from his plan with his girlfriend and co-defendant, Michelle Smith, to kill Ms. Smith's grandmother, Patsy Fowler, and steal cash from her home. Ms. Smith lived with the victim. The defendant had also been living with his grandmother, although he

had moved out after arguing with her the day before the crimes. The victim disapproved of Smith's relationship with the defendant, and the motivation for the crimes was for the couple to be together without the victim's interference. The defendant dressed in a ninja costume that Smith had purchased at the drug store where she worked. The defendant waited outside the victim's home until the early morning hours of September 16, 2004. Smith disconnected the telephones in the house and maintained communication with the defendant by text messaging. The defendant entered the home and stabbed the victim repeatedly with a sword. There were two locations in the home where the victim was attacked, and there was evidence that the victim struggled against the attack. The victim was eventually able to reach a neighbor's home. The defendant and Smith were arrested shortly after the crimes and admitted their culpability to the authorities.

The trial court granted defendant's counsel's request to order evaluation of the defendant for his competency to stand trial and evaluation of the defendant to determine his mental state at the time of the offenses. An evaluation report in the record reflects that the defendant was evaluated by experts from Vanderbilt University Medical Center, who determined that the defendant was competent for trial and that there was not evidence to support an insanity defense.

Following the mental evaluation, the defendant pled guilty on July 22, 2005, to attempted first degree murder and attempted especially aggravated robbery. The plea paperwork and the transcript of the sentencing hearing reflect that no agreement was made regarding sentencing.

Over eight months later, on March 8, 2006, defense counsel filed a motion to withdraw from representation of the defendant. Counsel attached a letter from the defendant stating the defendant's desire for counsel to move for withdrawal because the defendant felt uncomfortable with counsel as his representative. The defendant also stated his concern that counsel had not told him things and had not explained things to him. The trial court appointed other counsel for the defendant almost four months later. Four and a half months after that, on October 27, 2006, the trial court imposed sentences of twenty years for attempted first degree murder and ten years for attempted especially aggravated robbery and ordered that they be served consecutively.

The defendant filed a timely motion for judgment of acquittal and motion for new trial on November 27, 2006. The motion alleged that there was information which had not been presented to the court consisting of clinical notes documenting the defendant's mental health issues and a middle school incident in which he signed a letter in blood and that had the court had this information, it would have found the defendant not guilty by reason of insanity or would have sentenced him differently. The motion also sought appointment of an investigator to obtain information about the middle school incident and an evidentiary hearing on the defendant's mental condition. On January 10, 2007, the defendant filed an "Amended Motion for Judgment of Acquittal or a New Trial, Motion to Strike Sentence," which alleged the defendant's severe mental health issues affected his ability to distinguish right from wrong at the time of the crimes and may have affected his competency for trial. The motion also alleged that the clinical notes from the defendant's court-ordered evaluation were not received by the court or defense counsel before sentencing and that these notes contained evidence of the defendant's untreated mental health issues.

for the past ten years. This motion was stricken by the trial court for reasons that are not explained in the record, and on January 31, 2007, the defendant filed an “Amended Motion to Strike Sentence and in the Alternative Guilty Plea,” which again alleged that the clinical notes contained pertinent information that was not before the court or available to defense counsel at sentencing. The trial court denied relief. This appeal followed.

## I

The defendant claims that the trial court should have allowed him to withdraw his guilty pleas. He argues that he entered the guilty pleas believing he was receiving concurrent sentences but that the trial court imposed consecutive sentences. When the matter was heard, the State raised the issue of timeliness of the motion, which also sought reduction of sentence. We must determine whether the trial court properly declined to consider the motion to withdraw guilty pleas in order to determine whether we may then consider whether the defendant should have been allowed to withdraw the pleas.

Tennessee Rule of Criminal Procedure 32(f) permits a defendant to withdraw a guilty plea under certain circumstances. If a sentence has yet to be imposed, the trial court may grant a motion to withdraw “for any fair and just reason.” Tenn. R. Crim. P. 32(f)(1). If the defendant has been sentenced, a trial court may still grant a motion to withdraw a guilty plea before the judgment becomes final but only “to correct manifest injustice.” Tenn. R. Crim. P. 32(f)(2). Our supreme court has held that “a judgment of conviction entered upon a guilty plea becomes final thirty days after acceptance of the plea agreement and imposition of the sentence.” State v. Green, 106 S.W.3d 646, 650 (Tenn. 2003).

We note that the defendant’s original motion for judgment of acquittal or new trial challenged, albeit in inartful terms and without reference to Rule 32, the validity of the defendant’s guilty plea. The defendant’s January 31, 2007 amendment to the motion for new trial, entitled “Amended Motion to Strike Sentence and in the Alternative Guilty Plea,” raised the issue of “striking” the guilty pleas in its caption. Although the defendant attempted to relate this filing back to the November 27, 2006 motion for new trial, the trial court treated this motion as one under Tennessee Rule of Criminal Procedure 35. Upon consideration, we hold that the defendant made a timely request to withdraw his guilty pleas, and the trial court erred in declining to rule on this issue. Thus, the case must be remanded for the trial court to determine whether the defendant should be allowed to withdraw his pleas. See Tenn. R. Crim. P. 32(f). Because we have, in section III below, determined that the trial court erred in sentencing the defendant under the Sentencing Reform Act as amended in 2005, consideration of the motion shall be pursuant to Tennessee Rule of Criminal Procedure 32(f)(1), addressing motions to withdraw guilty pleas before sentencing.

## II

Next, we consider the defendant’s claim that he should have been entitled to an additional mental evaluation. He argues that the trial court denied him the opportunity to present a “diminished

capacity defense” by failing to allow an additional mental evaluation, which he says would have allowed for mitigation of his sentence. He contends that the evaluation done for competency to stand trial and sustainability of an insanity defense did not address the question of diminished capacity for purposes of sentence mitigation and that for this reason, an additional evaluation was necessary. The State argues that the defendant did not make a timely request for a second mental evaluation. The State also argues that had the request been properly presented, the trial court would not have abused its discretion in denying it based upon the “non-severe” nature of the defendant’s mental health issues.

Tennessee Code Annotated section 40-35-113(8) provides that a judge may allow sentence mitigation if “[t]he defendant was suffering from a mental . . . condition that significantly reduced the defendant’s culpability for the offense . . .” The record reflects that the defendant requested that his sentence be mitigated based upon his mental health. The defendant’s January 10, 2007 and January 31, 2007 post-judgment motions seeking reduction of his sentences did not request a second mental evaluation. In those motions, he requested an investigator to interview fact witnesses from the defendant’s childhood, additional mental health records to be filed under seal, and “an evidentiary hearing on the extent of Defendant’s mental condition and competency.” The record also contains a sealed envelope which was filed as part of the appellate record. The envelope bears the handwritten note “filed 3/1/07 C.E.” and contains an undated “Motion to Determine Competency Ex Parte” for purposes of determining the defendant’s “competency to stand trial, assist counsel, and/or enter into a plea on the offenses” and to determine whether the defendant’s mental health “would preclude [him] from being able to make rational and intelligent decisions.” Attached to the motion are various documents addressing the defendant’s prior school performance. This sealed envelope also contains an order which directs (1) that the defendant be “psychiatrically evaluated and specifically tested for mental retardation and other mental defects that affect the defendant’s competency to stand trial” and (2) that the records of the evaluation and other previously produced records be subject to a protective order. This order is signed by the trial court and dated March 1, 2007. The defendant claims in his reply brief that Vanderbilt refused to evaluate the defendant further, but the defendant has failed to cite to the record for this factual assertion. The record contains no information regarding whether a second evaluation took place.

In resolving this issue, we consider the trial court’s actions or inactions at two junctures—before sentencing and following the ex parte motion. The decision whether to order a mental evaluation, whether on the court’s motion or that of a party, is subject to review for abuse of discretion. See, e.g., State v. Lane, 689 S.W.2d 202, 204 (Tenn. Crim. App. 1984).

Before sentencing, the defendant did not request an additional mental evaluation for purposes of sentence mitigation. We acknowledge that authority exists for a trial court to act upon its own motion when a question exists “about the defendant’s mental capacity at the time of the commission of the crime” and hold a hearing and ultimately order a mental evaluation. T.C.A. § 33-7-301(a)(1), (2). We see no abuse of discretion, however, in the trial court’s lack of order for additional evaluation. The court had information about the defendant’s mental health, including expert

evidence about the defendant's sanity at the time of the offenses, but the court had no indication additional information was needed.

Moving to the issue of the trial court's actions once the defendant filed an ex parte motion for the second expert evaluation, we note that the record before us reflects that the court ordered the second evaluation requested by the defendant. We have no information of record before us to indicate the outcome of that ordered evaluation. Thus, we are unable to review any subsequent actions of the trial court as a result of that order. We note, however, this ruling does not preclude an evaluation on remand if the trial court deems it appropriate and necessary. The defendant has demonstrated no abuse of discretion.

### III

Finally, the defendant argues that the sentences imposed by the trial court violated his Sixth Amendment right to a jury trial because the trial court enhanced his sentences based upon facts that were found by the court, rather than by a jury beyond a reasonable doubt. He also argues that this court should modify his sentences to concurrent service. The State argues that the defendant waived any objection to the sentencing procedure by failing to object in the trial court, that there was no plain error in establishing the length of the individual sentences, and that the trial court did not err in imposing consecutive sentences.

Upon review of the transcript of the sentencing hearing, we note a determinative issue which has not been raised by either party. The trial court applied the sentencing law that was in effect at the time of the sentencing hearing, not that which was in effect at the time of the offenses. In sentencing the defendant, the court found that the defendant's sentences should be enhanced based upon the defendant's leadership in the commission of the offense, the involvement of two or more criminal actors, the victim's particular vulnerability, the victim's particularly great injuries, and the defendant's lack of hesitation in committing the offense. In listing these factors, the court recited the statutory numbering scheme for the factors that followed the numbering scheme of the Sentencing Act in effect at the time of the hearing, not at the time of the offense. Compare T.C.A. § 40-35-114(2), (3), (4), (6) (10) (2006) (amended 2007, 2008) (reflecting numbering of enhancement factors recited by trial court at sentencing) with T.C.A. § 40-35-114(3), (4), (5), (7), (11) (2003) (amended 2005, 2007, 2008) (reflecting numbering of same factors under version of Sentencing Act which applied to the defendant's crimes). The differences in the two acts are significant. Further, the Sixth Amendment arguments raised by the defendant are concerns which are applicable to the law that was in effect at the time of the crimes, but those concerns were addressed by the revised sentencing law adopted in 2005.

Upon review of the record, we note that although the defendant was sentenced after the change in the sentencing laws took effect, there is no indication in the record that he signed a waiver of his ex post facto protections and for sentencing under the new laws. See T.C.A. § 40-35-210, Compiler's Notes. Therefore, the sentencing law in effect at the time of the offenses was the proper

framework for establishing the defendant's sentences. See, e.g., State v. Daryl S. Hooper, No. M2007-00094-CCA-R3-CD, Humphreys County (Tenn. Crim. App. June 24, 2008).

In light of the trial court's application of the wrong law, we conclude that this case must be remanded for resentencing under the Sentencing Act that existed at the time of the offenses, rather than as it exists after the 2005 amendments. Given the potential for sentencing lengths to affect consecutive sentencing, resentencing shall include the issue of consecutive sentencing. See State v. Marshall, 888 S.W.2d 785 (Tenn. Crim. App. 1994) (approving trial court's adjusting lengths of sentences in considering whether to impose consecutive sentencing).

In consideration of the foregoing and the record as a whole, the trial court's order denying the motion to withdraw the guilty pleas is reversed and the case is remanded for a hearing on the defendant's motion to withdraw his guilty pleas. Because there is also error in the sentences imposed, the case is also remanded for resentencing in accord with this opinion, in the event the trial court denies the motion to withdraw the guilty pleas.

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JOSEPH M. TIPTON, PRESIDING JUDGE